No. 90-60

In The

Supreme Court of the United States

October Term, 1989

UNION TEXAS PETROLEUM CORPORATION, AGIP PETROLEUM COMPANY and MINATOME CORPORATION,

Petitioners,

versus

P L T ENGINEERING, INC., STATE SERVICE COMPANY, INC., POWER WELL SERVICE, INC., GULF ISLAND-IV, BROWN & ROOT USA, INC. and SUB SEA INTERNATIONAL, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, or federal maritime law is applicable to individual contracts for specific activities performed in a maritime setting on the high seas in connection with mineral production from the Outer Continental Shelf.

2. Whether Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, precludes private persons from freely choosing the law to be applicable to their contracts in conformity with Louisiana law, where no public policy is violated by the choice of law stipulation.

3. Whether Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, operates to extend the boundaries of a Louisiana parish to the outer limits of the Outer Continental Shelf for administrative purposes in connection with lien recordation and enforcement.

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The petitioners, Union Texas Petroleum Corporation, Agip Petroleum Company and Minatome Corporation,[1] respectfully pray that a writ of certiorari issue to review

[1] Pursuant to Rule 29.1, a list naming all parent companies and subsidiaries of each corporation was included in the Application for Extension of Time to File Petition for Writ of Certiorari previously filed on May 23, 1990, under Application No. A-833.

the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 7, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 895 F.2d 1043 (5th Cir. 1990), and is reprinted in Appendix A, *infra*. The memorandum rulings of the United States District Court for the Western District of Louisiana (Duhe, J.), dated March 10, 1988 and May 18, 1988, are unreported, and are reprinted in Appendices B and C, *infra*, respectively.

JURISDICTION

On March 7, 1990, the Fifth Circuit entered its judgment and opinion affirming the district court's ruling granting respondents' Motions for Summary Judgment. No petition for rehearing was sought. On May 24, 1990, Justice White granted petitioners' application for an extension of time and extended the time for filing a petition for writ of certiorari to and including July 5, 1990. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Outer Continental Shelf Lands Act ("OCSLA"), 67 Stat. 462 (1953) (codified as amended at 43

U.S.C. § 1333), "Laws and regulations covering lands." The entirety of this statutory provision is reprinted in Appendix D, *infra*.

Louisiana Statutes Annotated – Revised Statutes, Title 9:4861, "Privilege for labor, services, or supplies." The entirety of this statutory provision is reprinted in Appendix E, *infra*.

Louisiana Statutes Annotated – Revised Statutes, Title 9:4862, "Preservation and ranking of privilege." The entirety of this statutory provision is reprinted in Appendix F, *infra*.

Louisiana Statutes Annotated – Revised Statutes, Title 49:6, "Gulfward boundary of coastal parishes." The entirety of this statutory provision is reprinted in Appendix G, *infra*.

STATEMENT OF THE CASE

On August 15, 1986, Union Texas Petroleum Corporation ("UTP") entered into an offshore construction contract (the "Construction Contract") with PLT Engineering, Inc. ("PLT") for the design, fabrication and installation of an underwater gas transportation line from a platform owned by UTP, Agip Petroleum Co. Inc. and Minatome Corporation and operated by UTP in Vermilion Area Block 237, over the Outer Continental Shelf ("OCS") off the coast of Louisiana, to a side-tap in the Bluewater Pipeline in Vermilion Area Block 225, also on the federal OCS off the coast of Louisiana.

In order to perform its obligations to UTP under the Construction Contract, PLT entered into contracts with Brown & Root U.S.A., Inc. ("Brown & Root"), State Service Company, Inc. ("State Service") and Sub Sea International, Inc. ("Sub Sea") (the "Subcontracts"). In connection with the services it agreed to provide under its contract with PLT, State Service contracted with Power Well Service, Inc. and *Gulf Island-IV* (collectively "Power Well"). Each of the subcontractors was called upon by contract to perform certain specific tasks in connection with the construction of the line, which was fabricated on a vessel designed for that purpose, then laid upon and buried in the seabed. At issue herein is an *in rem* judgment granting liens in favor of Brown & Root, State Service, Sub Sea and Power Well, against certain properties belonging to UTP and its partners on the OCS, including their mineral lease and pipeline right-of-way, pursuant to LSA-R.S. § 9:4861 (the "Lien Act"). *See* Appendix E, *infra*.

Both the Construction Contract between UTP and PLT and the Subcontracts were provided by PLT and all were virtually identical. Each is in the same format, is identified in the same manner as "Contract For Union Texas Petroleum Vermilion Pipeline Project Fabrication, and Installation of Pipeline," and each contract contains the same critical stipulation. Article 21.1 of Exhibit A of each contract provides:

> If the work to be performed pursuant to this Contract is conducted in whole or in part over the Continental Shelf or in navigable water then this Contract shall be governed and construed in accordance with the General Maritime Laws of

> the U.S. If the work to be performed is conducted on land, then the Laws of the State of Texas shall govern the provisions hereof.

Thus, each contract at issue contains a provision requiring application of General Maritime Law to the work performed thereunder over the Outer Continental Shelf. Notwithstanding this stipulation, each of the claimants asserted a claim under the Lien Act for the amount due under its respective contract, on the basis that the law of Louisiana provides a lien for the types of services performed under that contract.

Under its contract, Brown & Root was obligated to provide the vessels, personnel, machinery and equipment necessary to fabricate and install the approximately three-mile long submarine pipeline in one hundred twenty-five feet of water. The focal point of the entire operation involved the mobilization of a special purpose, fully-manned, two hundred ninety foot long by seventy-two foot wide "Pipe Lay and Pipe Bury Barge," the BAR-278. The mobilization also included support vessels, including a tug boat, crew boat, pipe barge and the divers, diver tenders and such members of the crews of the vessels as were necessary. *Record* at 323. The work performed by Brown & Root was done from those vessels over the OCS and those workers involved in the project ate, slept and worked on or from the various vessels. *Record* at 431. The work that was not actually performed on the barge or other vessels, to a large degree, involved transportation of labor, materials and supplies to the work site and divers working on the floor of the Gulf of Mexico in connection with the burial of the line. *Record* at 585. Brown & Root was eventually discharged from the

job and its contract was terminated when high seas and weather related down-time prevented the efficient and economical completion of its task. *Record* at 975, 980-81, 987-89.

State Service contracted with PLT to provide construction vessels and diving services to the offshore pipeline project. The contract called for State Service to mobilize the necessary vessels, manpower, equipment and diving services to perform the undersea connection of the line to the UTP platform at one end and the Bluewater Pipeline at the other. State Service was also obligated to test and de-water the line. *Record* at 75-76. When weather caused Brown & Root to be removed from the operation, State Service provided divers to do remedial burial work on the line. *Record* at 666. The work was centered around and performed from vessels over the OCS or by divers in the sea. Some of State Service's work was done on the ocean floor, while some of it was performed by divers in the ocean itself at or near a riser attached to the underwater leg of the UTP platform. *Record* at 767-71. The workers ate on, slept on, and worked from the various vessels. *Record* at 431. Power Well's sole contribution to the project was to provide the vessel, the *Gulf Island-IV,* under an agreement with State Service. Power Well had no direct contract with PLT. *Record* at 285-86, 302-07.

Sub Sea contracted to provide diving personnel with support equipment and vessels. *Record* at 30-31, 624. The divers were hired to inspect the work done by the other subcontractors in order to insure that they complied with UTP's contractual specifications. Those divers ate and slept on the vessels provided by their employer, Sub Sea,

and worked from and upon those vessels. *Record* at 431, 624.

As a result of these various contractual undertakings, the underwater line was eventually completed and tested, then accepted by UTP. However, through communications with one or more of PLT's subcontractors, UTP became aware of the fact that PLT had not been paying its subcontractors. For that reason, and in accordance with the contract between it and PLT, UTP withheld $420,045.59 from the amount due under the contract. At the time at which that money was withheld, UTP had already paid PLT $1,340,830.35 for services performed under the Construction Contract. UTP instituted proceedings in the District Court as an interpleader action to enable PLT and its subcontractors to determine how the sum withheld should be allocated among those entities. Each of the subcontractors answered and filed counterclaims against petitioners asserting separate liens for the work which they each performed.

After cross-motions for summary judgment were filed and considered, the District Court held that the choice of law provisions contained in the contracts were unenforceable, that federal admiralty law was inapplicable to the facts as not constituting traditional maritime activities, and that Louisiana and federal recordation requirements for liens had been sufficiently complied with. Appendix B, *infra*. Jurisdiction was asserted under 43 U.S.C. § 1349(b)(1) and 28 U.S.C. § 1331. For reasons which vary somewhat with the District Court, a panel of the Fifth Circuit Court of Appeals affirmed the holding of the District Court. Appendix A, *infra*. Petitioners seek

review of that decision through this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the decision of the Fifth Circuit because that opinion involves the construction and application of OCSLA with regard to important issues arising from offshore mineral exploration and production. In the first instance, the decision calls into question the proper standards and analysis for determining whether a contract related to offshore mineral production will be characterized as maritime or non-maritime for purposes of application of federal maritime law or state law under OCSLA. Additionally, the opinion raises the question of whether OCSLA was intended to exclude the application of the adjacent state's choice of law rules, with the result that parties are effectively denied the right granted under state law to select the law to govern their contract, even in the instance in which no public policy is violated. Finally, the Fifth Circuit has construed OCSLA in combination with a Louisiana statute to create a legal fiction which circumvents the strict statutory lien recordation requirements of Louisiana law and which itself is inconsistent with the terms of OCSLA.

The principal body of law in question, the law applicable to the characterization and construction of contracts related to offshore mineral production, is one presently fraught with conflicts and inconsistencies resulting from various decisions by this Court and the Fifth Circuit, the court most often presented with cases in this area. As a

consequence of opinions arising from the personal injury context and from the application of statutes other than OCSLA, the law in this area is in a state of confusion, marked by conflicting lines of cases based upon questionable authority and by the lack of consistent standards for analysis and reasoning. The resulting uncertainty over whether maritime law, OCSLA, or the law selected by contract will apply to a given contract or activity has serious and far-reaching consequences for all those connected with the offshore oil and gas industry, especially as to the rights and liabilities of those parties and the causes of action and remedies available to them in connection therewith.

Both the importance of the issues presented and the question of the continuing validity of the authorities relied upon herein were discussed at length in the subsequent Fifth Circuit decision in *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083 (5th Cir. 1990) (reprinted because of its importance in the consideration of this writ application in Appendix H, *infra*). Noting the uncertainties existing in both the areas of law concerning characterization of contractual liabilities arising from offshore mineral exploration and the effect of choice of law clauses contained in such contracts, the Fifth Circuit itself acknowledged that "these inconsistent lines of authority" have resulted in "a serious legal conundrum," and acknowledged the need for a uniform approach and standards to be established by this Court in the following summary:

> Moreover, for purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of "vessels" in offshore oil exploration, the dissimilarity between

> such exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

898 F.2d at 1087; p. App. 55, *infra*. As is evident, this matter concerns questions in terms of the interpretation and administration of the OCSLA having significant impact upon the offshore mineral industry, and are clearly of such a recurring nature as to require an analysis and formulation by this Court of precedential guidelines. Based upon the standards previously set forth by this Court and in the applicable decisions of the Fifth Circuit, it is submitted that the court erred in its findings in the present matter that maritime law was not applicable to the contracts at issue, that the choice of law stipulations contained in those contracts were pretermitted by OCSLA, and that Louisiana lien laws were applicable and were complied with herein.

1. **The decision below raises important questions concerning both the proper method for analysis and the characterization of contracts for determination of whether federal maritime law or the law of the adjacent state through OCSLA will govern the rights and liabilities thereunder.**

The question of determining what law is to be applicable to the various causes of action which may arise in connection with the exploration and production of minerals offshore and the related interplay between maritime law and state law as applied through OCSLA, is a recurring one and one over which this Court has repeatedly exercised jurisdiction. In the present case, the narrow

issue of the proper characterization of the individual contracts as being maritime or non-maritime in nature and the resultant determination that the law of admiralty or OCSLA would apply is now apparently subject to tests of conflicting standards drawn from prior jurisprudence arising in the personal injury, property damage or indemnity contexts. The policies of OCSLA and the efforts by the courts to implement them in personal injury and other "social law" contexts have created problematic precedents for the determination of commercial contract disputes. Both the analysis employed and the finding reached in the instant case determining that the contracts at issue were non-maritime in nature evidence the confusion in the law and the need for uniform guidelines in the administration of OCSLA with regard to contracts related to mineral production. Most critically, the result, purportedly dictated by a consideration of Congress' goal to provide a body of law for the workers on "artificial islands" constructed on the offshore seabed, ignores the paramount goal of not affecting the high seas as highways of commerce. *See* S.Rep. No. 411 of the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 2 ("OCSLA jurisdiction does not in anywise affect the character as high seas of the waters above [the] seabed and subsoil nor their use with respect to navigation and fishing.").

Background

The controlling premise here is the established principle that the construction of a maritime contract will be governed by maritime law. *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332 (5th Cir. 1981); *Transcontinental Gas*

Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 691 (5th Cir.), *cert. denied*, 400 U.S. 832 (1970). The implementation of OCSLA was not intended to displace the application of maritime law to traditional maritime activities on the OCS. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218 (1986). The purpose of OCSLA was "to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf," and to apply federal law, supplemented by the state law of the adjacent state, to those fixed structures and the seabed as though they were "federal enclaves in an upland State." *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 353, 355 (1969). The limitations on the scope of OCSLA were further defined by this Court in the *Tallentire* decision, in which the Court rejected the attempt to extend OCSLA beyond the area defined by the statute, requiring that it not be construed in a manner which would affect the high seas, even as to injuries to OCSLA-covered platform workers on the high seas. *Id.* at 218.

The traditional test for determining whether a particular contract may be characterized as maritime was stated in this Court's decision in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), as "whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce." *Id.* at 736. In fact, as noted by the Fifth Circuit, the development of offshore oil production has necessitated an expansion of both maritime law and of the already broad definition of a maritime contract. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 954 (5th Cir. 1988); *see also*, 1 E. Jhirad, A. Sann, B. Chase & M. Chynsky, *Benedict on Admiralty* § 182, at 12-4 (7th ed. 1985).

In the context of offshore mineral production, application of these general definitions has not been without difficulty, and divergent lines of authority have arisen, both of which are cited as authority by the Fifth Circuit in the present opinion. In the first of these, oil and gas drilling on navigable waters aboard a vessel was held to be maritime commerce, with the result that the contract focused upon the use of a vessel in a maritime transaction, and thus was a maritime contract governed by maritime law. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986); *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 466 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983); *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981); *see also, Rodrigue v. LeGros*, Docket No. 89-C-2828 (La. June 4, 1990). However, that analysis and result were called into question below because of the opinion of this Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). There, in considering the question of coverage under the Longshoremen's & Harbor Workers' Compensation Act for non-vessel workers, the Court focused upon the specific tasks performed by those platform workers, and concluded that mineral exploration and development of the Continental Shelf "are not themselves maritime commerce." *Id.* at 425. In a subsequent Fifth Circuit decision, *Thurmond v. Delta Well Surveyors, supra*, a case which has been considered for practical and precedential purposes to be indistinguishable from *Theriot*, the Fifth Circuit found that the principal obligation of the contract was non-maritime because the cause of action arose out of the performance of a non-maritime obligation, *i.e.*, well-servicing operations performed from a vessel. Importantly, in a concurring opinion, Judge Garwood notes the inconsistency in the Fifth Circuit's

opinions in this area, and the fact that the separate lines of cases in the area fail to consider or cross-cite each other. Similar concerns are expressed in *Lewis v. Glendel Drilling Co.*, 898 F.2d at 1086-88; p. App. 52-57, *infra*.

The case principally relied upon as authority by the Fifth Circuit herein, *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985), involved the determination of whether a single contract for the construction of a well platform on OCS waters was maritime. The Fifth Circuit found that, in the context of oil and gas exploration on the OCS, maritime law would apply "if the case has a sufficient maritime nexus wholly apart from the situs of the relevant structure in navigable waters." *Id.* at 1230. The operations there involved the use of vessels, but the court went to great lengths to specify that the cause of action at issue grew only from that portion of the contract that related to actual platform construction, and not the other provisions in the pertinent contract relating to diving services, etc. The court found that since OCSLA is made expressly applicable to "platform construction," 43 U.S.C. § 1331(1), OCSLA jurisdiction applied.

Argument

All of the cited cases involve the use of vessels on the OCS in relation to mineral production, and draw into focus the difficulties presented in applying to contractual issues the precedents of this Court interpreting the intent of OCSLA's provisions in contexts other than maritime contracts. In the first instance, it appears that this Court

has recognized that it was not the intent of Congress to supplant existing admiralty rules. *Tallentire*, 477 U.S. at 218. Rather, the intent was to direct the application of specific bodies of law to areas to which no law applied naturally, *i.e.*, "artificial islands." *Rodrigue*, 395 U.S. at 361. Thus, the Fifth Circuit properly stated below that in order for OCSLA to incorporate state law: (a) the controversy must arise in an OCSLA location; (b) federal maritime law must not apply of its own force; and, (c) the state law must not be inconsistent with OCSLA. Admittedly, many of the activities at issue here were performed on the seabed and the pipeline was buried therein, and thus those activities can be said to bear upon an OCSLA location. But, even conceding for purposes of argument that an OCSLA location was involved and that the state law at issue here is not inconsistent with any federal law, maritime law, as it has been traditionally applied, must be said to pertain to the activities performed under each of the contracts herein. In fact, a principal error by the courts below was the failure to analyze each of the contracts involved separately and the activities performed giving rise to the claims in conformity with traditional maritime contract tests.

As noted, Power Well's sole contribution to the enterprise was to provide a vessel, and Brown & Root provided the special purpose vessel which was the focal point of the operation. A contract to charter a vessel is unquestionably a maritime contract. *Kossick v. United Fruit Co.*, 365 U.S. at 735; 1 *Benedict, supra*, § 123, at 12-7. Sub Sea and State Service essentially contracted to provide diving services, Brown & Root also supplied divers, and a contract to provide diving services is considered

maritime. 1 *Benedict, supra,* § 184, at 12-17, *citing Smith v. Brown & Root Marine Operators,* 243 F. Supp. 130 (W.D.La. 1965), *aff'd,* 376 F.2d 852 (5th Cir. 1967); *The Murphy Tugs,* 28 F. 429 (E.D.Mich. 1886). In sum, because the fabrication, laying and burying of the pipeline involved the use of a special purpose vessel, as well as divers and other vessels and seamen, and because all of the above-referenced activities relate to mineral production offshore, the issue demanding this Court's resolution is drawn. Can it now be said as a rule of law that activities relating to the production of minerals on the OCS which involve contracts for the provision those traditional instruments of admiralty are, *ipso facto,* not maritime? This is essentially the issue which creates the "legal conundrum" which the *Lewis* panel struggled with, and the one which the panel below considered was addressed and answered by this Court in *Herb's Welding,* with this Court's conclusion that "[t]he history of the Lands Act at the very least forecloses the Court of Appeals' holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes." 470 U.S. at 422.

It is respectfully submitted that this conclusion drawn by the court below from *Herb's Welding* is improper. It inverts and then extends the rule stated by this Court well beyond the holding, and beyond the intent of Congress in implementing OCSLA. It is certainly true that mineral activities on the OCS are not, of necessity, maritime for LHWCA or OCSLA purposes. It does not follow from this premise that mineral activities which are conducted from vessels designed for mineral development are therefore not maritime. Where the function of a

vessel in commerce relates to mineral development activities, it follows that contracts calling for the use of vessels in the conduct of those activities are maritime. This conclusion is drawn directly from maritime principles developed over many years, and nothing in the legislative history of the OCSLA suggests an intent to define maritime commerce or mineral development in such a way as to exclude the operation of such vessels from the law of admiralty as it applies on the OCS. In fact, the record suggests a contrary intent, to the effect that activities conducted by vessels and contracts involving vessels on the high seas will not be affected by the OCSLA.

As indicated above, to the extent that proper analytical standards may be gleaned from the jurisprudence in the determination of the law applicable to a contract related to mineral production on the OCS, it seems clear that the courts should analyze the language and obligations of each contract at issue with regard for the specific activity from which the cause of action arose. Where the subject matter of the case has a direct relationship with the traditional subjects of maritime law, *i.e.*, maritime commerce, maritime law will apply. In the case of a mixed contract, a balancing of maritime and non-maritime obligations, with regard for the extent of the use of "instruments of admiralty," would be determinative. To the extent that such standards apply to this question, the opinion below effectively circumvents their application by failing to consider the causes of action, subcontracts, and activities performed on an individual basis, and by focusing upon the principal obligation and result of the primary contract between UTP and PLT and its relation to mineral production.

It is important to note that the cause of action brought by each claimant for lien rights is defined pursuant to LSA-R.S. 9:4861 which, by its terms, grants an *in rem* privilege for the amount due for the labor or services rendered. *See* Appendix E, *infra*. Thus, each individual cause of action must have been brought pursuant to the specific contract under which that party claimed entitlement to a lien for the amount due under that contract. As noted previously, the subject matter of each of the four subcontracts here at issue involved separate activities or obligations to be performed, and each had a different "principal obligation" from that of the primary contract between UTP and PLT. Each contract specified the provision of and utilization of instruments of admiralty, and the subject matter of each cause of action must be said to have a direct relationship with the traditional subjects of maritime law.

The errors by the Fifth Circuit result in an unreasonable extension of OCSLA to certain contracts that are clearly maritime in nature, and pose significant consequences in the area of contracting in the offshore industry. It is submitted that this entire area of law requires clarification and the formulation of substantive guidelines by this Court.

2. The decision below raises important questions concerning the statutory construction of OCSLA with regard to whether the Act operates to invalidate choice of law provisions of contracts which are favored by law and contravene no public policy.

The Fifth Circuit, without analysis, labelled OCSLA as "a Congressionally mandated choice of law provision"

which requires the application of the substantive law of the adjacent state, even where the parties to a contract have stipulated a choice of law, and without regard to whether that provision contravenes any public policy. This finding unreasonably extends the holding in *Matte v. Zapata Offshore Co.*, 784 F.2d 628 (5th Cir.), *cert. denied*, 479 U.S. 872 (1986), which was grounded on such public policy considerations. This ruling clearly has a serious impact upon the freedom of parties to contract and upon the policy goals of certainty and uniformity in the area of commercial relations. Further, any number of offshore contracts in which the parties have selected the law to be applicable would be defeated in all instances in which OCSLA applied, without regard to a traditional jurisdictional analysis.

The legislative history of OCSLA evidences no intent on the part of Congress to in any way restrict the implementation of the choice of law principles of the adjacent state through OCSLA. The language of the statute itself provides at § 1333(a)(2)(A) only that "the civil laws" of the adjacent state are to apply, and contains no limitation as to a state's civil laws concerning choice of law. The principle favoring choice of law in Louisiana is found in Louisiana Civil Code article 7 which provides that parties may choose the law to be applied when such action does not "derogate from laws enacted for the protection of the public interest." Thus, where the parties stipulate the law to govern the contract, Louisiana conflict of laws principles require that the stipulation be given effect, unless there is statutory or jurisprudential law to the contrary or strong public policy considerations justifying the refusal to honor the contract as written. *Delhomme Industries, Inc. v.*

Houston Beechcraft, Inc., 669 F.2d 1049, 1058 (5th Cir. 1982). Additionally, courts have traditionally favored, and tended to uphold, contractual choice of law provisions and have been reluctant to declare such provisions void as against public policy. *See Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356-57 (1931); *Fine v. Property Damage Appraisers, Inc.*, 393 F. Supp. 1304, 1308 (E.D.La. 1975). Finally, the Louisiana statutory and jurisprudential law offer no suggestion that a waiver of lien rights by contractual stipulation or otherwise is against public policy.[2]

Neither of the cases from this Court cited in the present opinion directly addressed nor determined this issue. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court found only that the federal OCSLA forum is to be treated as the local forum, and not as a foreign forum, when applying adopted state conflicts principles. *Id.* at 102-03. That ruling was cited only in that context in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), which

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[2] As noted, the claims by respondents in the present case were brought pursuant to their individual contracts, so that those claims must be governed by the contractual choice of law provisions contained in those contracts. Additionally, in an argument not reached by the court of appeal, petitioners asserted their entitlement to enforce the choice of law stipulations in those subcontracts based upon petitioners' status as third party beneficiaries of those contracts. This result obtains under both federal maritime law, *see Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Harris v. Waikane Corp.*, 484 F. Supp. 372 (D.Hawaii 1980), and under the law of Louisiana. *See* La. Civ. Code arts. 1978-82 (1984); *State ex rel. Guste v. Simoni, Heck & Associates*, 331 So.2d 478 (La. 1976); *Andrepont v. Acadia Drilling Co.*, 225 La. 347, 231 So.2d 347 (1969).

must be read only as asserting that OCSLA's choice of law provision requires application of the adjacent state's law, but not that its rule as to statutory choice of law is not applied. By contrast, in interpreting the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which provides for the adoption of "the law of the place where the act or omission occurred," this Court held in *Richards v. United States*, 369 U.S. 1 (1962), that the Act required application of the whole law of the state where the act or omission occurred, including its conflict of laws rules. The *Huson* Court also suggested that the whole body of state law must be adopted by OCSLA, focusing on the Act's policy favoring the application of "a comprehensive body of state law" in refusing to apply only certain aspects of a state remedy in federal court, and citing *Richards*, stating: "[I]t supports our holding that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply." 404 U.S. at 105 n. 8.

Not only did the Fifth Circuit fail to employ this reasoning, it also failed to analyze the present case for public policy considerations which might limit the application of choice of law rules, the principle which was central to the holding in *Matte v. Zapata Offshore Co.*, 784 F.2d 628 (5th Cir. 1986). Noting that Louisiana law permits parties to select the law which will govern their contractual relationship, the court found that in that instance, that right had to yield to public policy considerations with regard to contractual indemnity statutes. Finding a violation of state public policy, the court also noted the policy of "federal deference" embodied in

OCSLA demonstrating that it would incorporate the public policy of the coastal states, and that contracts offensive to state policy may be similarly repugnant to the Lands Act.[3] The subsequent Fifth Circuit decision in *Wooton v. Pumpkin Air, Inc.*, 869 F.2d 848 (5th Cir. 1989), does not address the issue of contractual choice of law stipulations but misapplied this Court's decision in *Huson*, and ignored the language therein relative to applying the whole law of the adjacent state. The *Wooton* court's concern as to the "potential hall of mirrors" of state conflicts rules is dispelled by a consideration of modern interest analysis in contract actions which would dictate in almost every instance that adjacent state law would be applicable, except in the unusual case in which fairness to the parties dictated otherwise.

In the absence of a clear expression by Congress of an intent to the contrary, the Fifth Circuit has placed an unreasonable construction on OCSLA which denies parties the contractual freedom to stipulate in accordance with Louisiana law where no public policy violation is at issue. This interpretation is at variance with prior statements by this Court in *Huson*, and suggests an inappropriate abridgement of the parties' ability to tailor their rights and liabilities to their particular commercial enterprises on the OCS. This issue is a significant one requiring resolution by this Court, touching as it does upon the

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[3] A recent Louisiana Supreme Court decision suggests that the Fifth Circuit may have overstated the importance of Louisiana public policy considerations on this issue when compared with the significant goals of freedom of contract and uniformity of commercial maritime transactions. *See Rodrigue v. LeGros*, Docket No. 89-C-2828 (La. June 4, 1990).

general principles of freedom of contract and the proper application of OCSLA by the courts.

3. The decision below construes OCSLA so as to create a legal fiction for compliance with Louisiana statutory recordation requirements, the effect of which constitutes judicial legislation and violates the provisions of OCSLA itself.

In considering the interplay between OCSLA and the Louisiana lien recordation requirements contained in LSA-R.S. 9:4862(A)(1), the Fifth Circuit has effectively enacted its own recordation scheme enabling the creation of certain extra-contractual security interests on the Outer Continental Shelf. That opinion purports to extend the boundaries of a Louisiana parish "to the outer limits of the OCS," in order to assert that the property against which liens were filed by respondents was located in that parish. That conclusion constitutes the thinnest of legal fictions, and clearly violates the provisions of OCSLA itself which expressly prohibit any interpretation of the Act which would extend the interest or jurisdiction of any state over the OCS for any purpose. As the Fifth Circuit had previously recognized, the specific recordation requirements of Louisiana law are not enforceable against leasehold properties located on the OCS, and the court's strained construction of OCSLA serves to rewrite the Louisiana statute and improperly extend the State's administrative functions to the federally-administered OCS.

Under Louisiana law, lien statutes are laws in derogation of common rights, require strict construction, and lien rights arise only when plainly and expressly created

by statute. *See Southport Petroleum Co. of Delaware v. Fithian*, 203 La. 49, 13 So.2d 382, 383 (1943). Pursuant thereto, recordation is an indispensable prerequisite to the validity of a lien in Louisiana, as provided in LSA-R.S. 9:4862:

> § 4862. Preservation and ranking of privilege.
>
> A. (1) *To preserve the privilege* granted by R.S. 9:4861, *a notice* of such claim or privilege, setting forth the nature and amount thereof, *shall be filed for record and inscribed in the mortgage records of the parish where the property is located*. (Emphasis added.)

Because the Lien Act creates rights against specific property of another for labor or services that were performed in connection with that property, the Louisiana legislature has required recordation within the parish where the property is then physically located for purposes of jurisdiction over the creation of those rights, and of the administration and enforcement of those rights. In previous decisions, the Fifth Circuit had recognized that recordation in compliance with the statute is mandatory for the creation or preservation of a lien, and could not be complied with when the property against which the lien is claimed is physically located on property outside of any parish, *i.e.*, on the OCS. *St. Mary Iron Works, Inc. v. McMoran Exploration Co.*, 802 F.2d 809, 814 (5th Cir. 1986), *vacated on rehearing*, 809 F.2d 1130, 1135 (5th Cir. 1987). The court's prior ruling was in compliance with Louisiana policy with regard to limiting lien rights, and was consistent with the function of OCSLA of applying only

those state laws which were applicable, necessary to fill gaps in and not inconsistent with federal law.

In constructing its legal fiction, the Fifth Circuit places questionable reliance upon LSA-R.S. 49:6, which has the effect only of extending the gulfward boundaries of the coastal parishes to the limits of the line of demarcation between state and federal waters. By its unprecedented utilization of OCSLA to extend the physical boundaries of the parishes *onto* the OCS, the court is in clear violation of the provisions of OCSLA itself, which provides at 43 U.S.C. § 1333(a)(3):

> (3) The provisions of this section for adoption of State law as the law of the United States *shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.* (Emphasis added.)

Such extension of the political jurisdiction of a state based upon the geographic boundaries of state sovereignty was specifically rejected by Congress in the formulation of OCSLA, and this Court has noted that "the adoption of state law as federal law cannot be the basis for a claim by the State 'for participation in the administration of or revenues from the areas outside of State boundaries.' 1953 S.Rep., at 23." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 (1981). The application of these Louisiana statutes in the manner envisioned by the Fifth Circuit must be said to be "inconsistent" with the provisions of the Act.

The federal recordation scheme does not provide any means for compliance with the recordation requirement for validity of a lien, but that question remains one for resolution by Congress or by the Secretary of the Interior through MMS compliance,[4] and cannot properly be the subject for judicial legislation by the Fifth Circuit. The policies of OCSLA bear no relevance to this issue, and it cannot be said that Congress contemplated or intended to extend the coverage of lien laws for the benefit of private corporations engaged in doing business on the OCS. It is not correct that respondents would be denied the protection of Louisiana law without lien rights, as those parties would otherwise still be afforded the full panoply of rights for actions under their contracts. Rather, respondents would be afforded only those rights under Louisiana law which are applicable and necessary to protect their interests. This attempt by the Fifth Circuit to circumvent a requirement of Louisiana statutory law by drafting its own recordation scheme through an expansive and unwarranted construction of OCSLA requires this Court's consideration and correction.

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[4] In this regard, it must be noted that OCSLA provides its own comprehensive procedures for lease and pipeline right-of-way administration. In fact, the 1978 amendments to the Act were intended by Congress to provide all-inclusive, "one-stop shopping" procedures for the administration of OCS leases. H.R. Rep. No. 590, 95th Cong., 1st Sess. 126 (1977), reprinted in 1978 U.S. Cong. & Admin. News 1450, 1455. Thus, not only is the creation of this fiction unnecessary to fill a void or gap in the comprehensive federal leasing and pipeline right-of-way regulations, the potential for affecting title to these federally-administered leases and rights-of-way through the incorporation of extra-contractual remedies is inconsistent with the federal lease administration scheme provided by OCSLA.

CONCLUSION

As demonstrated above, the decision by the Fifth Circuit raises serious questions regarding the application and construction of OCSLA which, by their nature and importance, require resolution by this Court. Those determinations have immediate and significant consequences for all parties involved in the offshore mineral production industry in this country. The judicial precedents established herein will have a marked impact on both the lower courts and future litigants, involving as they do matters relating to the proper law to be applied to contracts connected with mineral production offshore, the freedom of parties to stipulate the law to be applied to such contracts, and the interplay between federal and state law with regard to administration of interests in that area. The decision below, absent review by this Court, effectively resolves these important and far-reaching issues. Because of the significance of these questions and because petitioners believe the decision below to be incorrect, they respectfully request that their Petition for Writ of Certiorari to the Fifth Circuit be granted.

Respectfully submitted,

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APPENDIX A

UNION TEXAS PETROLEUM CORPORATION, Plaintiff,

v.

PLT ENGINEERING, INC., Defendants,

State Service Company, Inc., Defendant-Counter-Plaintiff,

POWER WELL SERVICE, INC. and Gulf Island-IV, a Louisiana Partnership, Intervenors-Appellees,

v.

UNION TEXAS PETROLEUM CORPORATION, Agip Petroleum Company and Minatome Corporation, Counter-Defendants-Appellants.

UNION TEXAS PETROLEUM CORPORATION, Plaintiff,

v.

PLT ENGINEERING, INC., et al., Defendants,

Brown and Root USA, Inc. and Sub Sea International, Inc., Defendants-Appellees,

and

State Service Company, Inc., Defendant-Counter-Plaintiff-Appellee,

Union Texas Petroleum Corporation, Agip Petroleum Company and Minatome Corporation, Counter-Defendants-Appellants.

Nos. 88-4823, 89-4118.

United States Court of Appeals,
Fifth Circuit.

March 7, 1990.

Patrick W. Gray, Charles B. Griffis and George Arceneaux, III, Liskow & Lewis, Lafayette, La., for counter-defendants-appellants.

Robert J. Burvant and John T. Nesser, III, Nesser, King & LeBlanc, New Orleans, La., for intervenors-appellees.

Mitchell J. Hoffman, Lowe, Stein, Hoffman & Allweiss, New Orleans, La., for State Service Co.

Robert W. Daigle, Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, La., for Sub Sea Intern.

Stewart F. Peck, Nathan P. Horner, Lugenhuhl, Burke, Wheaton, Peck & Rankin, New Orleans, La., for Brown & Root USA, Inc.

Appeals from the United States District Court for the Western District of Louisiana.

Before BROWN, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

On this appeal from the entry of summary judgments, we hold that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-56 (1986 and Supp. III 1989), requires the application of Louisiana state law to

non-maritime contract disputes arising from the construction of a gathering line on the seabed of the outer Continental Shelf (OCS). We further hold that the subcontractors were entitled to assert liens against the project under the Louisiana Oil well Lien Act (LOWLA), LSA-R.S. 9:4861 *et seq.* The availability of the liens was not defeated by the language of LOWLA or contract provisions. Thus we affirm the summary judgments in favor of the subcontractors.

An Underwater Pipeline

Union Texas Petroleum Corporation (UTP) entered into an offshore construction contract with PLT Engineering, Inc. (PLT). PLT was to design, fabricate, and install a gas transportation system from a platform owned by UTP, and its partners[1] in the Vermilion Area Block 237 off the coast of Louisiana, to a side tap in the Bluewater Pipeline owned by Columbia Gulf Transmission Company and located in Vermilion Area Block 225. The platform and the pipeline at the point of the side tap are located on the OCS. The gas transportation system was built to function as a gathering line. The line is located in its entirety on the OCS. Completed, it belongs to UTP.

The Contractual Network

In order to complete the gathering line, PLT entered into contract with Brown & Root USA, Inc., State Service

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[1] Agip Petroleum Company and Minatome Corporation were sued along with UTP, however, for purposes of simplicity, the opinion refers to them collectively as UTP.

Company, Inc. and Sub Sea International, Inc. Additionally, State Service contracted with Power Well Service, Inc. and *Gulf Island IV*, a jack-up barge. Brown & Root, State Service, Sub Sea and Power Well are referred to collectively as the subcontractors. Brown & Root was contractually obligated to construct the pipeline by welding together joints of pipe supplied by PLT, to bury the line, and to lay the pipe close to the platform at one end and the Bluewater Pipeline at the other. Brown & Root performed labor and services and furnished materials, equipment and supplies including a barge. After Brown & Root had laid the gathering line, State Service was to fabricate and install tap assemblies to connect it to the platform and the Bluewater Pipeline. State Service also did some burial and testing work using divers. It worked from vessels and chartered Power Well's *Gulf Island IV* in connection with its work on the project. Sub Sea provided inspection services performed by divers, to ensure that the other subcontractors complied with contractual specifications. Sub Sea provided vessels for these divers to work from. Most of the work done under the subcontracts took place on the ocean floor or on a riser on UTP's platform. Some vessels were used for transportation of men and facilities. Others afforded living facilities. The *Gulf Island IV* was used to fulfill contract obligations.

PLT eventually completed and tested the line. However, through communications with some of the subcontractors, UTP learned that PLT had not paid the subcontractors. Accordingly, UTP invoked the contract provision that allowed it to withhold money from the amount due under the contract with PLT. UTP withheld $420,045.59 then instituted an interpleader action under

F.R.Civ.P. 22 to enable PLT and the subcontractors to determine how the money should be allocated among them. Each of the subcontractors answered and filed counterclaims asserting liens.

After cross motions for summary judgment, the trial court issued a Memoranda Ruling. It held that (i) LOWLA[2] was applicable, (ii) the choice of law provisions in the subcontracts[3] could not be enforced by UTP because of a lack of privity, (iii) federal admiralty law was not applicable because the activities involved were not traditionally maritime and thus OCSLA applied, and (iv) recordation requirements for the liens were sufficiently complied with by filing in adjacent parishes and with the Department of the Interior's Mineral Management Division. The trial court then dismissed the interpleader action as inappropriate since LOWLA was applicable. The district court retained jurisdiction under 43 U.S.C. § 1349(b)(1) and 28 U.S.C. § 1331. Eventually

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[2] The relevant provisions of LOWLA are cited and discussed, *infra*, in the section entitled "UTP Can't Sink LOWLA."

[3] The subcontracts provided:

> If the work to be performed pursuant to this contract is conducted in whole or in part over the Continental Shelf or in navigable water then this contract shall be governed and construed in accordance with the General Maritime Laws of the U.S. If the work to be performed is conducted on land, then the laws of the State of Texas shall govern the provisions hereof.

Contract for Union Texas Petroleum Vermilion Pipeline Project Fabrication, and Installation of Pipeline, Exh. A, § 21.1 (Oct. 14, 1986) (contract by and between Brown & Root and PLT). Each contract contained this clause.

final judgments were entered in favor of each of the subcontractors.[4] Without challenging the correctness of the subcontractors' claims or the receipt of their value, UTP appeals from all aspects of the trial court's rulings.

Breathing Salt Air

[1] The trial court held that Louisiana law, rather than maritime law applied to these contracts by operation of the Outer Continental Shelf Lands Act (OCSLA). 43 U.S.C. §§ 1331-1356 (1986 & Supp III 1989). UTP argues that OCSLA cannot apply to work performed in a maritime setting on the high seas. It places a great deal of reliance on the recent Supreme Court decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). We agree with the trial court and hold that *Tallentire* does not impose the application of maritime law in this case.

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[4] Power Well and *Gulf Island IV* received summary judgment in the undisputed amount of $93,551 plus 10% attorneys' fees and interest (with an accompanying decrease in State Service's lien) on May 17, 1988. R. 874-76. Brown & Root received summary judgment in the stipulated amount of $450,000 plus 10% attorneys' fees and interest along with some additional adjustments on Sept. 27, 1988. R. 1180-82. Sub Sea received summary judgment in the amount of $120,922.89 plus 10% attorneys' fees and interest on Dec. 14, 1988 (amending the order entered Mar. 14, 1988). R. 1281-83. State Service received summary judgment in the stipulated amount of $352,000 plus 10% attorneys' fees and interest on Jan. 19, 1989. R. 1292-94. These judgments were all made final and consolidated for appeal.

OCSLA provides in pertinent part:

> (1) The Constitution and laws and civil and political jurisdiction of the Untied States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. . . .
>
> (2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artifical [sic] islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . .

43 U.S.C. § 1333(a) (1986).

[2] *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 355-56, 89 S.Ct. 1835, 1837-38, 23 L.Ed.2d 360, 364 (1969), said:

> The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf. That this law was to be federal law of the United States, applying *state law*

> *only as federal law* and then only when not inconsistent with applicable federal law, is made clear by the language of the Act. (Emphasis added.)

Rodrigue made clear that "for federal law to oust adopted state law, federal law must first apply." 395 U.S. at 359, 89 S.Ct. at 1839, 23 L.Ed.2d at 366. But for adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artifical structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law. All of these conditions are met in this case.

UTP argues that all of the subcontractors' contracts for the building and completion of the pipeline called for services which were provided from vessels and by divers in the ocean, not on a platform, and therefore were not in areas covered by OCSLA. Perhaps in a more traditional approach, the contention comes down to an assertion that these collective contracts were maritime in nature and thus subject exclusively to admiralty law. On both grounds we disagree.

In the first place, the gathering line exactly fits the statutory definition of an "other device[] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom." 43 U.S.C. § 1333(a)(1). In addition, the gathering line was buried beneath the ocean floor. It was connected to a platform at one end. It was connected to a transmission line at the other. The locations where the substantial work was done were covered situses – the

subsoil or seabed;[5] an artificial island;[6] and an installation for the production of resources.[7] Thus the first condition is met.

Whether the second factor – that the activity be nonmaritime – is present requires further analysis. In a definition highly oversimplified which would exclude a myriad of contracts obviously maritime, one authority stated, " '[t]he only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce. . . . ' " *Kossick v. United Fruit Co.*, 365 U.S. 731, 736, 81 S.Ct. 886, 890, 6 L.Ed.2d 56, 61 (1961), *citing*, I Benedict, Admiralty 131.[8] The contracts at issue here were not maritime.

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[5] OCSLA extends the laws of the United States "to the subsoil and seabed of the [OCS]." 43 U.S.C. § 1333(a)(1). A line buried beneath the ocean floor is clearly covered. No party has disputed the fact that the gathering line lies, in its entirety, on the OCS.

[6] In *Rodrigue*, the court described drilling rigs as "islands, albeit artificial ones." 395 U.S. at 360, 89 S.Ct. at 1839, 23 L.Ed.2d at 367. OCSLA extends "to all artificial islands . . . " 43 U.S.C. § 1333(a)(1).

[7] OCSLA extends to "all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of . . . producing resources therefrom." 43 U.S.C. § 1333(a)(1). "The term 'production' means those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, . . . " 43 U.S.C. § 1331(m). The Bluewater Pipeline meets these criteria.

[8] True to the legal traditions of the sea, a more recent edition of *Benedict's* defines the maritime contract more broadly.

(Continued on following page)

In its analysis of the legislative history surrounding OCSLA, *Rodrigue* reflects that Congress was aware that it had the power to treat activities on the artificial islands as though they had occurred aboard ship and were thus maritime and in fact a proposed bill did so. However, in passing the bill that ultimately became OCSLA, "Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided not to make it apply." 395 U.S. at 361, 89 S.Ct. at 1840, 23 L.Ed.2d at 367. *Rodrigue* further explains that "the committee was acutely aware of the inaptness of admiralty law. The bill applied the same law to the seabed and subsoil as well as to the artificial islands, and admiralty law was obviously unsuited to that task." 395 U.S. at 364-65, 89 S.Ct. at 1841-42, 23 L.Ed.2d at 369 (footnote omitted).

The Fifth Circuit has likewise determined that "[i]n the context of contract disputes, the principle underlying *Rodrigue* and *Kimble [v. Noble Drilling Co.*, 416 F.2d 847

(Continued from previous page)

> In matters of contract, the principal determinant which emerges from a long course of decisions is the relation which the cause of action bears to the ship, the great agent of maritime enterprise, and to the sea as a highway of commerce. A contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water.

1 E. Jhirad, A. Sann. B. Chase & M. Chynsky, Benedict on Admiralty § 183, at 11-6 (7th ed. 1985) (cited in *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 954 (5th Cir.1988)).

(5th Cir.1969), *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970),] precludes the application of maritime law except in those cases where the subject matter of the controversy bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231 (5th Cir.1985).

Laredo's arguments were much akin to UTP's. It argued that (1) to perform contract obligations, many seamen and vessels had to be hired, and (2) the recovery of oil and natural gas from the seabed was a traditional maritime activity. The court there held:

> The contract involved here . . . did more than charge Laredo with the responsibility of carrying workers and supplies to the well site. Laredo's principal obligation under the contract was the construction of a stationary platform, and, as Laredo conceded at oral argument, it is the alleged breach of this obligation that gave rise to the instant action. While the contract no doubt contemplated the hiring of vessels and seamen to build the structure, the subject of this case has no direct relationship with these traditional subjects of maritime law. It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law. That the contract contemplated in part the use of instruments of admiralty, therefore, is not sufficient to oust OCSLA-adopted state law in this case.

Id. at 1231-32.

As much a grey horse case as any diligent scholar or the ubiquitous tentacles of LEXIS could uncover, our case is much the same. While some maritime operations were

undoubtedly contemplated, the principal obligation of PLT and the subcontractors was to build the gathering line and connect it to the platform and the transmission line. These activities are not traditionally maritime. Rather they are the subjects of oil and gas exploration and production.

No subsequent case alters the result. In *Herb's Welding Inc. v. Gray*, 470 U.S. 414, 422, 105 S.Ct. 1421, 1426, 84 L.Ed.2d 406, 413 (1985), the Supreme Court reversed this court, finding that "[t]he history of the Lands Act at the very least forecloses the Court of Appeals' holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes."[9]

UTP is afforded no comfort by *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986), in which we stated that "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce." *Id.* at 538-39. It is important that the cases relied on by the court in

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[9] As always, the lessons of prior cases must be applied in deciding new cases that arise under different statutes. Under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, coverage may extend beyond admiralty's boundaries. However, the threshold question under both LHWCA and OCSLA is: does the dispute arise out of traditional maritime activity? Thus, while the LHWCA was not intended to "cover all those who breathe salt air," neither was OCSLA intended to exclude them all. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 105 S.Ct. 1421, 1427, 84 L.Ed.2d 406, 414 (1985).

Theriot predated both *Laredo* and *Herb's Welding*.[10] Furthermore, in *Herb's Welding* the Supreme Court had specifically criticised the Fifth Circuit's "expansive view of maritime employment" which it found was not consistent with LHWCA cases. 470 U.S. at 423, 105 S.Ct. at 1427, 84 L.Ed.2d at 414.

Finally, we point out that *Theriot* was predicated on the theory that "[w]hether a particular contract can be characterized as maritime depends on the nature and character of the contract, not on the situs of its performance or execution." 783 F.2d at 538. While this has merit as a general proposition, "Congress determined that the general scope of OCSLA's coverage, . . . would be determined principally by locale, not by the status of the individual injured or killed." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219, 106 S.Ct. 2485, 2492, 91 L.Ed.2d 174, 188 (1986). Therefore, we construe *Theriot* narrowly and constrain it to its facts. Since no drilling on navigable waters from a vessel is involved here, *Theriot* is not controlling.

Tallentire does not in any way change our result. In it, two platform workers were killed when the helicopter which was transporting them from the platform to shore

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[10] The court relied on *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir.1981); *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 466 (5th Cir.1981), *reh'g en banc*, 680 F.2d 1034 (5th Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983). The continued validity of these cases has not been tested in light of *Herb's Welding*. The court distinguished *Herb's Welding*, 783 F.2d at 539, n. 11, reading it as holding only that "not every worker performing a task in oil and gas production from fixed platforms is engaged in maritime employment."

crashed into the sea. Recognizing that "[b]y its terms, OCSLA must be 'construed in such a manner that the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected,' § 1332(2)," the Court held that in contrast with the Death on the High Seas Act (DOSHA), OCSLA was not applicable. 477 U.S. at 217-19, 106 S.Ct. at 2491-92, 91 L.Ed.2d at 186-87. Critical to this holding was the Court's determination that,

> admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Although the decedents were killed while riding in a helicopter and not a more traditional maritime conveyance, that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an "island," albeit an artificial one, to the shore.

477 U.S. at 218-19, 106 S.Ct. at 2492-93, 91 L.Ed.2d at 187. In other words, the Supreme Court found in *Tallentire* that (1) the accident did not occur at an OCSLA situs – it took place miles away from the platform where the decedents worked over the open sea, and more than that, (2) federal maritime law did apply of its own force to the loss of two lives in the ocean, a classic case of maritime jurisdiction. *Tallentire* did not change the law, it merely followed it.

Whatever doubt could remain – and we can conjure up none – is dispelled by *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir.1988), which following *Herb's Welding* stated that "[t]he principal obligation

under this contract was to perform wireline services, clearly a nonmaritime obligation in the sense that it does not concern the operation of the vessel. Such services are peculiar to the oil and gas industry, not maritime commerce."

Because the contracts at issue were nonmaritime, OCSLA came into force so that Louisiana state law applies to the claims for liens regardless of whether a particular service supplied would be maritime (e.g. charter hire).

Submerging (Not Drowning)
Louisiana Law

UTP argues that even if OCSLA applies, the parties have chosen admiralty law through the choice of law provisions in their contracts.[11] This argument can not prevail.

Although Louisiana's choice of law rules might enforce this choice of law provision OCSLA will not. We find it beyond any doubt that OCSLA is itself a Congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary. *See Matte v. Zapata Offshore Co.*, 784 F.2d 628, 631 (5th Cir.), *cert. denied*, 479 U.S. 872, 107 S.Ct. 247, 93 L.Ed.2d 171 (1986); *Wooton v. Pumpkin Air, Inc.*, 869 F.2d 848, 852 (5th Cir.1989); *See also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 n. 8, 101 S.Ct. 2870, 2877

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[11] *See supra* note 3.

n. 8, 69 L.Ed.2d 784, 794 n. 8 (1981) ("OCLSA [sic] does supercede the normal choice-of-law rules that the forum would apply."); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-03, 92 S.Ct. 349, 353-54, 30 L.Ed.2d 296, 303 (1971).

UTP Can't Sink LOWLA

LOWLA is available for all of the subcontractors. Now embracing LOWLA, UTP asserts three reasons against the availability of lien rights under the facts of this case. (1) By the letter of LOWLA, the subcontractors are not entitled to assert liens. (2) The recordation requirements of LOWLA cannot be complied with hence liens are not available. (3) The right to assert liens was waived by the choice of law provisions in the subcontracts. We disagree with all of these arguments and hold that the subcontracts were entitled to assert liens, they were properly recorded, and their right to assert liens was not waived.

First, LOWLA expressly provides for a lien privilege in favor of

> [a]ny person who performs any labor or service in drilling or in connection with the drilling of any well or wells in search of oil, gas or water, or who performs any labor or service in the operation or in connection with the operation of any oil, gas or water well or wells, or performs any labor or service in the construction, operation, or repair or in connection with the construction, operation, or repair of any flow lines or gathering lines, regardless of their length, which are attached to or connected with the oil, gas or water well or wells, and any pipeline owned by the producer, operator or contract operator of the well. . . .

LSA-R.S. 9:4861(A) (emphasis added). The privilege is in all the oil or gas produced from the well or the proceeds thereof or any equipment, lines or other appurtenances on the lease. *Id.*

The argument in this regard is largely grammatical. For example, UTP argues that in order to have a lien privilege arising out of the construction of a gathering line, the gathering line must connect to both a well and a pipeline owned by the owner of the well. In other words, they read a common ownership requirement into the statutory provision. Such a requirement, if it existed, would not be met in our case because the well is owned by UTP while the transmission line, the Bluewater Pipeline, is owned by Columbia Gas Transmission.

The comma after "well or wells" and before "and any pipeline" services no grammatical function under UTP's theory. Under the subcontractors' theory, which we adopt, it sets off the phrase "which are attached to or connected with the oil, gas or water well or wells." The phrase thus modifies gathering line and flow line. We agree that the comma clearly establishes two classes of pipelines from which a lien might arise: (1) flow lines or gathering lines connected to the well and (2) pipelines owned by the well owner.

This provision of LOWLA was amended in 1984. Those amendments clearly incorporated the prior cases[12]

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[12] *See, e.g., Continental Casualty Co. v. Associated Pipe & Supply Co.*, 447 F.2d 1041 (5th Cir. 1971) (distinguishing between gathering lines and transmission lines); *McGee v. Missouri Valley Dredging Co.*, 182 So.2d 764, 767 (La.App. 1st Cir.1966).

and now mandate that those who construct gathering lines which are connected to a well have a lien privilege.

Second, the liens were properly recorded. The statute provides:

> To preserve the privilege granted by R.S. 9:4861, a motion of such claim or privilege, setting forth the nature and amount thereof, shall be filed for record and inscribed in the mortgage records of the parish where the property is located.

LSA-R.S. 9:4862(A)(1). UTP argues that this requirement was not complied with because the well (the property) is located on the OCS. Because the well is not located within the former physical boundaries of a parish, the liens could not be recorded "in the parish where the property is located."

UTP places some reliance on our *St. Mary* cases. *St. Mary Iron Works, Inc. v. McMoran Exploration Co.*, 802 F.2d 809 (5th Cir.1986), *vacated* 809 F.2d 1130 (5th Cir.1987). However, the second *St. Mary* decision explicitly refused to answer the question at issue here. There the court said, "[w]e leave the question of whether this statute has any effect on the interaction of the Lands Act and Louisiana law to another day." 809 F.2d at 1135, n.5. This is "another day."

If 9:4862 were to be read as UTP urges, to allow liens to be recorded only if the property is located on *land* in a parish, it would deny the subcontractors the protection of Louisiana law merely because their work was performed on the OCS rather than on shore. At the least, this would frustrate the Congressional intent behind OCSLA that state law operate as surrogate federal law on the OCS. It

would be anomalous to deny the liens here when a principal reason for adopting state law to apply as federal law on the OCS was to protect all those who perform activities, including providing services and materials, on the OCS.[13] *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 103-04, 92 S.Ct. 349, 353-54, 30 L.Ed.2d 296, 303-04 (1971); *Wooton v. Pumpkin Air, Inc.*, 869 F.2d 848, 851 (5th Cir.1989).

The combination of both OCSLA and Louisiana law extend Vermilion parish beyond the location of the work done here. Louisiana law provides that,

> the gulfward boundary of all said coastal parishes extend coextensively with the gulfward boundary of the State of Louisiana.

LSA-R.S. 49:6. OCSLA adopts this state law and extends the boundaries of Vermilion parish to the outer limits of the OCS by providing that state law applies to the subsoil and seabed of the OCS and all artificial islands thereon "which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . . " 43 U.S.C. § 1333(a)(2)(A). Thus the liens were actually filed in the parish where the property is located.

Any other result here would frustrate the Congressional purpose that the OCS be treated as an area of exclusive federal jurisdiction within the state where state law will apply to fill in the gaps in the federal law. *Brown*

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[13] See in contrast the treatment of workers compensation liabilities which for OCSLA purposes are covered by the LHWCA territorial extension. *See* 43 U.S.C. § 1333(b).

& Root v. Prosper Energy, Civ. Action No. 87-0343 (E.D.La. June 29, 1987) (unpublished).[14]

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[14] The *Brown & Root* case, involving the question of whether recordation in the coastal parishes adjacent to the mineral lease satisfied 9:4862, was remarkably similar to ours. We repeat with approval a portion of that opinion.

> The defendants concede that if the pipeline built by the plaintiff were located on land or within the waters of the state of Louisiana the lien sought by plaintiff would attach. However, they contend that because the property against which the lien is sought in this case is not located in a parish, there is no place in which to record the lien as required by La. Rev.Stat.Ann. 9:4862 and that therefore no lien exists. *Cf. St. Mary Iron Works, Inc. v. McMoran Exploration Co.*, 802 F.2d 809, 813-14 (5th Cir.1986) *vacated on reh'g*, 809 F.2d 1130 (5th Cir.1987)
>
> The recording requirement of La.Rev.Stat.Ann. § 9:4862 restricts the applicability of the LOLA to property located in the parishes of the state of Louisiana. That restriction, however, is contrary to the Congressional mandate that state law apply on federal lands on the Outer Continental Shelf. *Rodrigue*, 395 U.S. at 357 [89 S.Ct. at 1838]; *cf. Chevron Oil Co. v. Huson*, 404 U.S. 97 [92 S.Ct. 349, 30 L.Ed.2d 296] (1971).
>
> To protect laborers, materialmen and contractors and to encourage development of mineral resources Louisiana law has provided for oilfield liens since 1916. *See generally Louisiana Materials Co. v. Atlantic Richfield Co.*, 493 So.2d 1146-48 (La.1986). The defendant's view of this case denies the protection of Louisiana's lien laws to those providing oilfield services only because the services were provided to oilfield operators in federal territory. In passing the

(Continued on following page)

Third, the subcontractors did not waive their lien rights. UTP argues that the subcontractors all waived their rights to assert liens under Louisiana law because of a provision in each of their contracts that UTP contends made the project "lien free."

> Neither the final payment nor any part of the retention, if any, provided for in Exhibit E to the Contract shall become due until CONTRACTOR delivers to COMPANY a complete release or waiver of all liens arising or which may arise out of this Contract of as to the Work or any part thereof, or receipts in full in lieu thereof and, if requested by COMPANY, an affidavit that so far as CONTRACTOR has knowledge or information the release and receipts include all labor, material, and services for which a lien could be filed upon the pipeline against the COMPANY. CONTRACTOR shall indemnify and hold harmless the COMPANY from all liens and other encumbrances against the Work and any claims or actions on account of debts or claims with respect to the Work alleged to be due from CONTRACTOR or its subcontractors and suppliers to any person including subcontractors and suppliers, and will defend at its own expense any claim or litigation in connection therewith. The provisions of this Section 11.1.2

(Continued from previous page)

OCSLA, Congress intended exactly the opposite result. *See Rodrigue*, 395 U.S. at 356-58 [89 S.Ct. at 1837-38]; *cf. St. Mary*, 802 F.2d 809, 815 (5th Cir.1986), *vacated on other grounds*, 809 F.2d 1130 (5th Cir.1987) (applying the Louisiana Private Works Act on the Outer Continental Shelf).

> shall survive the termination or expiration of this Contract.[15]

Even if remotely valid under Louisiana law[16] (which we need not determine) we reject UTP's construction that no liens were to attach to the project. This provision expressly contemplates that liens might arise on the project. It merely says that they are to be released or waived before final payment is made. The reservation of indemnity not only refers specifically to "liens" but it would be wholly ineffectual under UTP's construction in the usual commercial setting where potential liens arise on the default or insolvency of the contractor.

Finding no waiver of liens, we need not reach UTP's argument that it is a third party beneficiary of the subcontracts.

Conclusion

Thus UTP fails on all its contentions. The District Judge was correct.

AFFIRMED.

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[15] Contract for Union Texas Petroleum Vermilion Pipeline Project Fabrication, and Installation of Pipeline, Exh. A § 11.1.2 (Oct. 14, 1986) (contract by and between Brown & Root and PLT) (emphasis added). Each contract contained a like clause.

[16] Louisiana law allows parties to waive their lien rights. *Wardlaw Brothers Garage, Inc. v. Thomas*, 19 La.App. 241, 140 So. 108 (La.App. 2d Cir.1932); *Babineaux v. Grisaffi*, 180 So.2d 888 (La.App. 3d Cir.1965). However, that waiver must be clearly indicated. *Bank of Jena v. Rowlen*, 370 So.2d 146 (La.App. 3d Cir.1979) ("materialman's lien may be waived expressly or by implication where there is a strong factual basis").

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNION TEXAS PETROLEUM CORPORATION

VS. CIVIL ACTION NO. 87-0521 "L"

PLT ENGINEERING, INC., ET AL

JUDGE JOHN M. DUHE, JR.

MAGISTRATE METHVIN

MEMORANDUM RULING
(Filed Mar 10, 1988)

This ruling concerns the consolidated motions for summary judgment by Brown & Root U.S.A., Inc. ("Brown & Root"), Sub Sea International ("Sub Sea"), State Service Company ("State"), intervenors Power Well Service, Inc. ("Power") and Gulf Island-IV ("Gulf") and the counter motion for summary judgment by plaintiff Union Texas Petroleum ("UTP"). This action was filed on March 6, 1987, as an interpleader complaint by UTP against PLT Engineering, Inc. ("PLT"), Brown & Root, State Service, and Sub Sea. At issue is the collection by claimants for services rendered in connection with a gas gathering pipeline constructed for UTP by PLT.

UTP, Agip Petroleum Co., Inc. ("Agip"), and Minatome Corporation ("Minatome") are the owners of Lease No. OCS-G6677, located in Vermilion Block 237, Outer Continental Shelf, Gulf of Mexico ("the lease"). Pursuant to an agreement among UTP, Agip and Minatome, UTP was designated the operator of the lease. On August 15, 1986 UTP and PLT executed a contract for the design and

construction of a gas pipeline from a platform owned by UTP in Vermilion Area Block 237 to the Bluewater Pipeline owned by Columbia Gulf Transmission in Vermilion Block 225. It was understood at the time of contracting that PLT would perform the services of design, material purchase, supervision, and inspection and that subcontactors [sic] would perform the actual construction services. Later defendants, as subcontractors, entered into contracts with PLT to perform various services in connection with the construction of the pipeline.

The sum of $420,000.00 was withheld by UTP pursuant to its contract because of PLT's alleged failure to perform certain conditions of the contract. It is this sum that UTP wishes to implead in this action. The defendants-subcontractors contend UTP has no right to interpleader. They contend that they are entitled to full payment from UTP for the services they rendered to UTP's pipeline. In addition, defendants have asserted lien rights pursuant to Louisiana law and as provided under the Louisiana Oil, Gas and Water Wells Lien Statute, La. Rev. Stat. 9:4861 *et seq.*

LAW AND ANALYSIS

UTP asserts five arguments for its proposition that defendants summary judgment should be denied and its summary judgment granted. (1) The contract between UTP and PLT and the contracts between PLT and the defendants under which the work was performed contained a choice of law provision which states that the contracts are to be governed by and construed in accordance with the general maritime law of the United States.

UTP contends these provisions preclude any application of Louisiana law to the present case, thus denying the defendants any entitlement to lien rights against the property. (2) *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485 (1986), establishes that Louisiana law will not be applied as a supplement to the Outer Continental Shelf Lands Act ("OCSLA"), to the types of services rendered in the present case since OCSLA must, by its own terms, yield to federal admiralty law when the matter at issue involves traditional maritime activites [sic] on the ocean. (3) The Louisiana Oil Well Lien Statute does not provide for a lien or privilege for the type of work performed in the present case, i.e. the construction of a gathering line which is not connected to an oil or gas well and a pipeline owned by the producer, operator or contract operator of that well. (4) No lien may attach where there is no statutory means of recording the required notice thereof, such as when the property at issue is located outside of any parish where filing may be effected. (5) Certain of the claimants have asserted duplicative claims which should be disallowed and there are factual issues relating to the amounts claimed by certain of the claimants which would prevent the award of summary judgment on behalf of the defendants.

CHOICE OF LAW BY CONTRACT:

Defendants acknowledge that the choice of law provision at issue is contained both in UTP's contract with PLT and in PLT's contracts with defendants, but defendants contend that UTP has failed to show that any contractual relationship exists between UTP and defendants. Further, the liens of defendants, and the claims filed herein seeking the enforcement of those liens, are

claims which have been asserted against the property interest of UTP. Therefore, defendants assert that the contractual stipulations in their contracts with PLT are not binding and do not govern their rights against UTP, a party with whom they have no privity of contract.

Further, a party is only bound by a contract to which it is a party. *See Farmers State Bank and Trust Co. v. Leger*, 503 So.2d 1141, 1143 (La. Ct. App. 1987). Because no contractual relationship exists between defendants and UTP, the choice of law provision in UTP's contract with PLT which states that general maritime law will govern the parties rights is not applicable to the claims asserted by defendants against UTP pursuant to La. Rev. Stat. § 9:4861 *et seq*.

CHOICE OF LAW BY TALLENTIRE:

Defendants disagree that *Tallentire, supra*, dictates the application of general maritime law, in lieu of OCSLA or Louisiana law, simply because some of the work performed by the various lien claimants was performed from vessels. *Tallentire, supra* stands for the proposition that OCSLA should not apply to traditional maritime activity which occurs on the ocean overlying the Outer Continental Shelf, i.e. travel by helicopter in lieu of a vessel. *Tallentire* is distinguishable from the case at hand, for although the services performed by defendants necessarily involved the use of vessels, they did not involve traditional maritime activity.

Further, the principal obligation of defendants was to build a pipeline from UTP's well to a pipeline owned by Columbia Gulf Transmission, clearly a non-maritime activity in the sense that it does not concern the operation

of a vessel. Such construction is peculiar to the oil and gas industry, not maritime commerce. Pipeline construction is performed on land-based wells as well as offshore wells and pipeline construction presents problems peculiar to the oil and gas industry. Maritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its rules are ill adapted for that purpose. *See Thurmand v. Delta Well Surveyors*, ___ F.2d ___ (5th Cir. 1988). Therefore, *Tallentire* is inapplicable to this situation which involves pipeline construction not a traditional maritime activity.

OWNERSHIP OF FACILITIES:

Plaintiff's third argument suggests that under the wording of La. Rev. Stat. 9:4861 *et seq*, a lien is granted for work performed upon a flow line or gathering line, only when such line is attached at one end to a well and at the other end to a pipeline owned by the same producer, operator, or contract operator of that well. Further, plaintiff contends this statute, as a lien statute, must be strictly construed and any ambiguity must be resolved against the party asserting the lien. Defendants contend that § 9:4861(A), as amended in 1984, which reads in pertinent part:

> Any person who . . . performs any labor or service in the construction . . . of any flow lines or gathering lines, regardless of their length, which are attached to or connected with the oil, gas or water well or wells, and any pipeline owned by the producer, operator or contract operator of the well, has a privilege . . . .

should be interpreted to grant a privilege to any person who performs any labor or service in the construction of

(1) any flow lines or gathering lines which are attached to or connected with the oil, gas or water well or wells or (2) any pipeline owned by the producer, operator or contract operator of the well.

The comma in question was added in the 1984 amendments to § 9:4861. The insertion of this comma is supportive of defendants' contention that the pipeline need not be connected to a well and a pipeline owned by the same producer, operator or contract operator. Furthermore, defendants' interpretation of Paragraph (A) of § 9:4861 is supported by the language contained in Paragraph B of the statute which allows a privilege to any person doing any trucking, towing, etc., in connection with the construction, operation or repair of (1) flow lines or gathering lines and (2) other pipelines owned by the producer, operator or contract operator of the well or wells.

Louisiana courts have drawn a distinction between transmission lines and pipelines that are part of a gathering system connected to producing wells. *See McGee v. Missouri Valley Dredging Company*, 182 So.2d 764 (La. Ct. App. 1966) and *Continental Casualty Company v. Associated Pipe & Supply Co.*, 279 F. Supp. 490 (E.D. La. 1967) (Continental Casualty I). The court in *McGee* reasoned that the scope of the statute should be limited to work directly related to that property upon which the statute grants a privilege. In *McGee*, the gas transmission line was not attached to the wells from which the gas transmitted through the pipeline originated, nor was it attached to any drilling rigs, therefore the court held no privilege attached. The reasoning of the court in *McGee* provides a logical basis for limiting the scope of the Oil Well Lien

Statute, while at the same time giving it sufficiently broad application so as not to frustrate the apparent liberal legislative intent. *Continental Casualty I, supra.*

Although this Court must construe statutes creating privileges and liens *stricti juris* because they are in derogation of common rights, this does not mean strained or unnatural construction. It means a fair, reasonable and natural interpretation by the ordinary rules for the construction of statutes with the goal of ascertaining the intention of the legislature. *See Continental Casualty I, supra.*

Accordingly, after applying the *McGee* test to the facts of this case, it is clear that the gathering pipeline at issue is within the realm of La. Rev. Stat. 9:4861 *et seq*, for the pipeline is attached to the well and is located on the lease.

PLACE FOR RECORDATION

Plaintiff's fourth argument asserts that under current Louisiana law, there is no procedure for the preservation of a lien on property not located in any parish where recordation may be effected. In *St. Mary Iron Works, Inc. v. McMoran Exploration Co.*, 809 F.2d 1130 (5th Cir. 1987) (St. Mary II), the Fifth Circuit specifically noted that the Louisiana Legislature had recently passed 1986 La. Act 191 amending the Oil Well Lien Act to make recordation within the time specified in the act a requirement for preservation of the lien. However, the Court left the question of whether this statute has any effect on the Lands Act and Louisiana law to another day.

In *Brown & Root U.S.A., Inc. v. Prosper Energy, CA,* 87-0343 (E.D. La. 1987), Judge Boyle held that the Oil Well Lien Statute is applicable on the Outer Continental Shelf because the recordation requirement which restricts applicability to property located in the State of Louisiana is contrary to the Congressional mandate that state law apply on federal lands on the Outer Continental Shelf. *See Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357; *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Judge Boyle went on to state that since 1916 Louisiana law has provided oilfield liens to protect laborers, materialmen and contractors and to encourage development of mineral resources. UTP's argument would deny the protection of Louisiana's lien laws to those providing oilfield services only because the services were provided to oilfield operators in federal territory. In passing OCSLA, Congress intended exactly the opposite result. Therefore, since the Lands Act treats platforms and structures on the Outer Continental Shelf as if they were within the coastal state if its boundaries were extended to the outer limits of the Outer Continental Shelf, *see Genina Marine Services v. Arco Oil & Gas Co.*, 499 So.2d 257 (La. Ct. App. 1986), and La. Rev. Stat. § 49:6 provides that the gulfward boundaries of the coastal parishes extend coextensively with the gulfward boundary of the State of Louisiana, defendants' recordation of their liens in Vermilion Parish, (the coastal parish opposite UTP's well), satisfies La. Rev. Stat. § 9:4862.

CONCLUSION

There remain in this case factual issues concerning the amount of defendants Brown & Root, State Service

and intervenors claims. Therefore, their motions for summary judgment are denied. Since no factual issues exist as to the claim of Sub Sea, summary judgment in its favor against UTP in the amount of $120,922.89 plus interest and attorney fees is granted. Further, it is this court's opinion that the defendants' claims are against UTP's pipeline and well pursuant to La. Rev. Stat. 9:4861 *et seq.* Consequently, UTP cannot limit its exposure to defendants claim by depositing with this Court the sum of $420,045.59 which it withheld from PLT pursuant to their contract.

Although this ruling concerns motions for summary judgment and material outside the pleadings have been accepted in support thereof, it may be more proper to view these as motions to dismiss under Fed. R. Civ. P. 12(b)(6). A summary judgment which is made on the basis of the complaint may be treated as the functional equivalent of a motion to dismiss for failure to state a claim. *See* 10 C. Wright & A. Miller and M. Kane, *Federal Practice & Procedure* § 2713 (1983). Furthermore, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted addresses itself to the claim, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief, which is what is involved in the case at hand.

UTP has filed a complaint in the form of an interpleader and has deposited the sum of $420,045.59 into the registry of the court. In order to file an interpleader proceeding, UTP must be a mere stakeholder who requests the court to determine which of two or more

adverse claimants is rightfully entitled to funds or property possessed by it. Since this Court has determined that the defendants claims are not limited to the funds deposited by UTP but instead attach to UTP's well and pipeline pursuant to La. Rev. Stat. § 9:4861 *et seq*, UTP's complaint is improperly filed and therefore, fails to state a claim upon which relief may be granted.

Accordingly, Union Texas Petroleum's interpleader complaint is hereby dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

Lafayette, Louisiana, March 10, 1988.

/s/ John M. Duhe Jr.
JUDGE, U.S. DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNION TEXAS PETROLEUM

VS. CIVIL ACTION NO. 87-0521 "L"

P L T ENGINEERING, INC., ET AL

JUDGE JOHN M. DUHE, JR.

MAGISTRATE MILDRED METHVIN

MEMORANDUM RULING
(Filed May 18, 1988)

This ruling concerns the request by intervenors Power Well Service, Inc. and Gulf Island IV for this Court to review its Memorandum Ruling of March 10, 1988 as it pertains to them. In that ruling intervenor's motion for summary judgment was denied because there remain factual issues concerning the amount of intervenor's claims. In addition, there remained the issue raised by interpleader Union Texas Petroleum ("UTP"), that a lien exists exclusively in favor of the party who provides services directly to a project for which a lien is granted and that a claim does not exist in favor of a party simply because that party caused a third person to provide the services.

The facts of this case were clearly set forth in this Court's Memorandum Ruling of March 10, 1988, and this Court sees no need for a detailed restatement of those facts. After careful review of the briefs submitted on the original motions for summary judgment, it is this Court's

opinion that La. Rev. Stat. 9:4861(a) and (b) provides for liens in favor of any "person" who,

A. Performs any labor or services.

B. Does any of several enumerated acts.

It must have been obvious to the Legislature that this statutory scheme admitted the possibility of more than one potential lien claimant for the furnishing of a single service or activity. The clearest example of this possibility is present in this case. Intervenors provided their barge to the project therefore, they are entitled to assert their own rights for services physically provided by them to this project. In addition, State Service Company, Inc., as a contractor, provided services to the project which included those of intervenors. The owner, Union Texas Petroleum, is foreclosed from being twice liable for the same amount by the fact that payment of the actual supplier (intervenor) will extinguish the contractor's (State Service) lien by a like amount.

In the case at hand, there is no factual dispute concerning the amount owed to intervenors for the services they provided. The dispute was over the fact that State Service as well as intervenors filed a lien claim for the same services. Union Texas Petroleum did not dispute the amount owed to intervenors, but merely disputed the duplicate claims of State Service and intervenors. The affidavit of John Powers, President of Power Well Service, sets forth the amount due and owing intervenors at $93,551.00. Accordingly, since there is no factual dispute concerning the amount owed to intervenors for the services provided, intervenors are entitled to judgment on

their claim in the amount of $93,551.00 plus 10% attorney fees and interest, along with recognition of their claim under the Louisiana Oil Well Lien Act. In addition, State Services' lien will be reduced accordingly.

Lafayette, Louisiana, May 17, 1988.

/s/ John M. Duhe Jr.
JUDGE, U. S. DISTRICT COURT

APPENDIX D

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exporing [sic] for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries

were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be

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[1] So in original. Probably should be "settling".

payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et. seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section –

> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations; and
>
> (3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer

Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

(Aug. 7, 1953, c. 345, § 4, 67 Stat. 462; Jan. 3, 1975, Pub.L. 93-627, § 19(f), 88 Stat. 2146; Sept. 18, 1978, Pub.L. 95-372, Title II, § 203, 92 Stat. 635; Sept. 28, 1984, Pub.L. 98-426, § 27(d)(2), 98 Stat. 1654.)

APPENDIX E

Louisiana Revised Statutes, Title 9:4861

PART II. OIL, GAS, AND WATER WELLS

SUBPART A. IN GENERAL

§ 4861. Privilege for labor, services or supplies

A. Any person who performs any labor or service in drilling or in connection with the drilling of any well or wells in search of oil, gas or water, or who performs any labor or service in the operation or in connection with the operation of any oil, gas or water well or wells, or performs any labor or service in the construction, operation, or repair or in connection with the construction, operation, or repair of any flow lines or gathering lines, regardless of their length, which are attached to or connected with the oil, gas or water well or wells, and any pipeline owned by the producer, operator or contract operator of the well, has a privilege on all oil or gas produced from the well or wells, and the proceeds thereof inuring to the working interest therein, and on the oil, gas or water well or wells and the lease whereon the same are located, and on all drilling rigs, standard rigs, machinery, pipelines, flow lines, gathering lines and other related equipment, including, but not limited to, monitoring, measuring, metering and control equipment, appurtenances, appliances, equipment, buildings, tanks, and other structures thereto attached or located on the lease, and rights-of-way in the case of a gathering line, flow line or other producer, operator or contract operator owned pipeline for the amount due for labor or service, in principal and interest, and for the cost of preparing and recording the

privilege, as well as ten percent attorney's fees in the event it becomes necessary to employ an attorney to enforce collection.

B. Any person who does any trucking, towing or barging, or who makes any repairs, or furnishes any fuel, drilling rigs, standard rigs, machinery, equipment, material or supplies for or in connection with the drilling of any well or wells in search of oil, gas or water, or for or in connection with the operation of any oil, gas or water well or wells, or for or in connection with the construction, operation or repair of any flow lines or gathering lines, regardless of their length, and any other pipeline owned by the producer, operator or contract operator of the well or wells, whether or not a producing well is obtained and whether or not such materials, machinery, equipment, services and supplies are incorporated in or become a part of the completed oil, gas or water well, has a privilege on all oil or gas produced from the well or wells and the proceeds thereof inuring to the working interest therein and on the oil, gas or water well or wells and the lease whereon the same are located, and on all drilling rigs, standard rigs, machinery, appurtenances, appliances, equipment, buildings, tanks, pipelines, flow lines, gathering lines and other related equipment, including, but not limited to monitoring, measuring, metering and control equipment and other structures thereto attached for drilling, equipment and operation of the well or lease, and rights-of-way in the case of a gathering line, flow line or other producer, operator or contract operator owned pipeline, for the amount due for such trucking, towing, barging, repairs, fuel, drilling rigs,

standard rigs, machinery, equipment, material, or supplies, in principal and interest, and for the cost of preparing and recording the privilege as well as ten percent attorney's fees in the event it becomes necessary to employ an attorney to enforce collection thereof. This privilege is second in rank only to the privilege granted in favor of laborers.

Amended by Acts 1984, No. 949, § 1.

APPENDIX F

Louisiana Revised Statutes, Title 9:4862

§ 4862. Preservation and ranking of privilege

A. (1) To preserve the privilege granted by R.S. 9:4861, a notice of such claim or privilege, setting forth the nature and amount thereof, shall be filed for record, and inscribed in the mortgage records of the parish where the property is located:

(a) Within one hundred eighty days after the last day of the performance of the labor or service, in the case of laborers;

(b) Within one hundred eighty days after the last day of the doing, making, or performing of such trucking, towing, barging, or repairing, in the case of claimants doing, making, or performing such services; and

(c) In the case of furnishers of fuel, drilling rigs, standard rigs, machinery, equipment, material, or supplies, within one hundred eighty days from the last date of the delivery of such fuel, drilling rigs, standard rigs, machinery, equipment, material, or supplies to the well or wells.

(2) When so recorded, the privileges are superior to all other privileges or mortgages against the property, except taxes or a bona fide vendor's privilege, or privileges or mortgages filed or recorded prior to the date on which the first labor, service, trucking, towing, barging, repairs, fuel, drilling rigs, standard rigs, machinery, equipment, material, or supplies covered by the privilege herein granted is furnished.

B. The one hundred eighty day period shall not commence to run, and shall be suspended, so long as the person entitled to the privilege shall continue to furnish labor, services, fuel, materials, and supplies, or any of those things in the same oil field in which the well or wells subject to the privilege are located, to the same owner, operator, producer, or driller of the well or wells, and whether the labor, services, fuel, materials, and supplies, or any of those things are furnished to the well or wells subject to such privilege or to other well or wells.

C. The notice of such claim or privilege shall contain a description of the leased property of such nature as to make the leased property reasonably subject to identification.

Amended by Acts 1983, No. 374, § 1; Acts 1986, No. 191, § 1.

APPENDIX G

Louisiana Revised Statutes, Title 49:6

§ 6. Gulfward boundary of coastal parishes

A. The gulfward boundaries of the coastal parishes of the state of Louisiana situated east of the Mississippi River extended from the outer land terminus of their common boundary due east, true bearing, to the outer gulfward boundary of the state of Louisiana, and the gulfward boundaries of the coastal parishes situated west of the Mississippi River extended from the outer land terminus of their common boundaries due south, true bearing, to the outer gulfward boundary of the state of Louisiana, and the gulfward boundary of all said coastal parishes extend coextensively with the gulfward boundary of the state of Louisiana.

B. The interior or inland boundaries of all coastal parishes shall remain as now existing or fixed by applicable state laws.

Added by Acts 1954, No. 32, §§ 1, 2, eff. June 21, 1964.

APPENDIX H

Beverly Locks LEWIS, Individually and as the Tutrix of Her Minor Children, Nona Aisha Lewis, Erisa Kironda Lewis, Jamal William Lewis, Benita Leshawn Lewis and Jeriel Nicole Lewis, Plaintiff,

v.

GLENDEL DRILLING COMPANY and Pioneer Production Corporation, Defendants.

AVANTI SERVICES, INC., Defendant, Third Party Defendant, Cross-Defendant, Appellant,

v.

GLENDEL DRILLING COMPANY and Highlands Insurance Company, Defendants, Cross-Plaintiffs, Appellees,

Mesa (as Successors to Pioneer Production), Third Party Plaintiff, Cross-Defendant, Appellee.

No. 88-4934.

United States Court of Appeals, Fifth Circuit.

April 26, 1990.

Robert A. Redwine, Sessions, Fishman, Boisfontaine, Nathan, Winn, Butler & Barkley, New Orleans, La., for Avanti Services, Inc.

Douglas W. Truxillo, Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, La., for Glendel Drilling Co.

Patrick W. Gray, Lafayette, La., for Mesa Operating Ltd. Partners.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEE and JONES, Circuit Judges, and HUNTER[1], District Judge.

EDITH H. JONES, Circuit Judge:

This case confronts us again with the vexing question whether liabilities arising from offshore mineral exploration are to be determined: under federal admiralty or state law. The result here is foreordained by precedent, but because of an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result, the appellant would justly ask "why?". Perhaps this court should seek to answer Avanti's question *en banc*.

I.

FACTS

Avanti Services, Inc., appellant, signed a turnkey contract with Pioneer Production corporation (now Mesa Operating Ltd. Partners) to drill a well in Vermillion Block 55 in the territorial waters of Louisiana. Avanti hired Glendel Drilling to furnish a barge rig. The two contracts contain indemnity clauses designed to protect, respectively, Pioneer and Glendel from liability arising out of injuries to employees or invitees of Avanti on the

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[1] Senior District Judge of the Western District of Louisiana sitting by designation.

drilling site.[2] Except for references to the furnishing of tugs or crewboats in a checklist of equipment needed for the drilling, neither contract mentions a vessel or any maritime condition as bearing upon the work to be performed. Given the location of drilling, however, the use of an offshore drilling rig was obviously necessary. The contracts are in large part form documents used in onshore and offshore mineral exploration.

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[2] Pioneer-Avanti contract:

> 11.3 Contractor [Avanti] agrees to protect, defend, indemnify, and save Operator [Pioneer], its joint owners' and their respective officers, directors, and employees harmless from and against all claims, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Contractor's employees or Contractor's subcontractors or their employees, on account of bodily injury, death, or damage to property.

Avanti-Glendel contract:

> 14.9 Operator's indemnification of Contractor. Operator [Avanti] agrees to protect, defend, indemnify, and save Contractor [Glendel], its officers, directors, employees and joint owners harmless from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the causes or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees, or Operator's invitees, other than those parties identified in paragraph 14.8 on account of bodily injury, death or damage to property. . . . "

During the drilling, Avanti hired Schlumberger Well Services to log the well's progress. On April 16, 1985, Schlumberger's crew was on the rig either engaged in or just having completed this task when it was discovered that Ernest Lewis, an employee of Schlumberger, had drowned. He had apparently been trying to transfer to the pipe barge, and thence to Schlumberger's equipment barge, which were moored next to Glendel Rig 18.

Lewis's widow filed suit alleging general maritime claims against Pioneer, Glendel, and Avanti and a Jones Act claim against Schlumberger. The liability actions eventually settled, leaving for resolution the cross-claims for contractual indemnity filed by Pioneer and Glendel against Avanti.[3] The court initially granted Pioneer's and Glendel's motions for summary judgment granting indemnity under maritime law, but upon Avanti's request, it decided to hold a hearing and reconsider.

Avanti alleged that a fact issue existed concerning whether Schlumberger was its invitee at the time of the accident. Avanti had stitched together a circumstantial case suggesting that after Schlumberger finished its work for Avanti on April 16, it commenced an entirely different logging operation that must have been ordered by the lease operator Pioneer. If the accident occurred during the later, hypothetical engagement, Avanti contended, Schlumberger and Lewis, its employee, had become Pioneer's invitees and the indemnity tables were turned,

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[3] Avanti's contracts with Schlumberger and Glendel did not permit indemnity of Avanti for loss attributable to Avanti's payments of contractual indemnity. *See Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir.1981).

because Avanti was owed indemnity by Pioneer for injury to Pioneer's invitees. The court, after a hearing and receiving further evidence and briefs, rejected Avanti's argument and entered judgment calling for Avanti to indemnify Pioneer and Glendel according to their settlements with Plaintiffs.[4]

On appeal, Avanti continues to urge that summary judgment was erroneously ordered on the invitee issue. More important, however, Avanti questions the applicability of maritime law to its contractual indemnity obligations. We shall discuss these issues in inverse order.

II.

CONTRACTS FOR OFFSHORE OIL DRILLING AS MARITIME CONTRACTS

Avanti contends that its contracts with Pioneer to drill the wildcat well in Louisiana territorial waters and with Glendel to furnish its barge rig for that purpose are not maritime contracts.[5] The essence of a maritime contract, Avanti urges, is a connection with a vessel, but the instant contracts do not refer to a vessel. In a broader sense, Avanti urges that there is nothing inherently maritime in the business of offshore mineral exploration and that state law is better suited to resolve the problems it poses. Finally, because the contract which led to the death

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[4] No other issues relating to the indemnity obligations are before us.

[5] If Louisiana law governs Avanti's contracts with Pioneer and Glendel, Avanti would not be liable for contractual indemnity by operation of Louisiana's Oil Field Anti-Indemnity Act, La.Rev.Stat.Ann. 9:2780 (West.Supp.1989).

of Ernest Lewis was for the performance of wireline services by Schlumberger, Avanti contends that we are bound by our past recognition that wireline services performed offshore do not constitute maritime activity. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir.1988).

The relevant law of our circuit does not support Avanti's argument. Since at least as early as 1970, our authorities have identified contracts for offshore drilling and mineral operations involving the use of a "vessel" as maritime in nature. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir.1986) (contract for use of "the drilling barge Rome"); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir.1981) (contract for casing services to be performed on an inland drilling barge); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge "Mr. Charlie"*, 424 F2d 684, 691 (5th Cir.1970) (as to contract for offshore drilling and reworking operations, the court said "of course, the construction of a maritime contract is governed by federal, not state, law." [citations omitted]). Likewise, each of these cases interpreted an indemnity clause in the particular drilling or offshore servicing contract. As Avanti concedes, a contract need not specifically reference a vessel if it is actually "maritime". The drilling contract in *Theriot, supra*, provided that the drilling company "would furnish the equipment, materials, supplies, and services necessary to the drilling and completion of the well." 783 F.2d at 538. These terms are substantially similar to the terms of the contract between Avanti and Pioneer. The court's conclusion in *Theriot* that the contract "focused upon the use of a vessel", *i.e.* the drilling barge identified in an exhibit to the contract, inescapably leads to the same conclusion in this case.

A recent decision of this court questions whether *Theriot's* broad characterization of maritime contracts comports with the Supreme Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). *See Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir.1990). Judge Brown's opinion in *Union Texas* goes on to

> construe *Theriot* narrowly and constrain it to its facts. Since no drilling on navigable waters from a vessel is involved here, *Theriot* is not controlling.

Union Texas, at 1049. "Constrained to its facts," however, *Theriot* still controls the result in this case. Avanti's reliance on *Union Texas* must be limited to a plea for en banc review of the *Theriot* line of cases.

Only one case arguably runs counter to this authority. Avanti relies heavily on *Thurmond* for the proposition that a contract to furnish wireline services is "clearly a non-maritime obligation" . . . "performed on land-based wells and offshore wells, and wireline services present hazards and problems peculiar to the oil and gas industry." 836 F.2d at 955. *Thurmond* applied state law to the construction of an indemnity clause in a wireline service contract, although the contract was performed and the employee injured while working on a wireline barge in Louisiana territorial waters. *Thurmond* is, however, distinguishable precisely because the contract there interpreted called solely for the performance of wireline services by a contractor. Because our other cases hold that contracts to drill a well offshore or to provide general services in connection therewith are, when performed from a movable drilling platform, maritime obligations, we must be

bound by those authorities rather than by the special-purpose contract in *Thurmond*.

More difficult to dispose of is Avanti's reliance on the choice-of-law analysis applied by *Thurmond* and *Union Texas*. For although we are bound by cases construing contracts essentially analogous to those in issue here, we recognize the logical conflict between holding that such cases are inherently maritime while a contract for wire-line services, not specifically referencing the offshore nature of the work, but actually performed from a barge, is not. Judge Garwood noted the apparent inconsistencies among some of our cases in this area, as well as their failure to cross-cite each other, in his concurrence to *Thurmond*, 836 F.2d at 957-58.

From these inconsistent lines of authority springs the potential for significant uncertainty in the law applicable to offshore mineral exploration. The application of maritime or state law to a particular contract may turn, as in *Thurmond*, on the degree of specificity with which it identifies operations offshore or on navigable waters. It may turn on whether the particular contractor furnished a "vessel" in connection with his work. It may depend on whether the work is performed from a fixed platform or one of the several types of movable rigs that we have held to be "vessels." By act of Congress, whether the contract covered activity in state territorial waters or on the Outer Continental Shelf will also have an impact on the choice of law. *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a); *Laredo Offshore Constructors Inc. v. Hunt Oil Company*, 754 F.2d 1223 (5th Cir.1985).

How to resolve these inconsistencies is perplexing. What appears to us as a serious legal conundrum may have had little effect in the real world. That is to say, oil companies, drilling contractors and oil field service companies, together with their insurers, may already have adjusted to the overlapping applications of maritime and state law by choice of law clauses[6] or adjustments in the rates of coverage. We should not lightly "straighten out" the formal logic of the law where to do so would upset stable commercial expectations. Moreover, for purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of "vessels" in offshore oil exploration, the dissimilarity between such exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

This case radiates with the uncertainties that exist in this area of the law. Although it is technically resolved by application of settled authority, the persuasiveness of that authority is much in doubt.

There are at least three ways to resolve the inconsistency among our precedents. First, we could hold that no movable offshore oil and gas rig, when moored and engaged in exploration or production, is a vessel. This would apply the realistic view of *Thurmond* and *Sohyde* that (a) federal maritime law was not intended to cover

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[6] *See, e.g., Angelina Casualty Co. v. Exxon Corp.*, 876 F.2d 40, 42 (5th Cir.1989); *but compare Union Texas, supra,* at 1050 (parties may not contract away choice of law mandated by Congress through OCSLA).

liabilities arising from mineral exploration and (b) the adjective use of vessels to assist in such operations is not sufficient to invoke the law of admiralty. This result would also eliminate the rather absurd inconsistency that otherwise exists between applying maritime law to certain mineral exploration contracts when the drilling occurs in state territorial waters, as here, while state law governs precisely the same contractual relationship a few miles further offshore pursuant to the OCSLA. *See Laredo Offshore Constructors, Inc. v. Hunt Oil Company, supra.* As Judge Garwood put it,

> Given the OCSLA directed applicability of state law to such activities when conducted on the outer continental shelf, *see Laredo,* there is plainly much to be said, as Judge Wisdom points out, for also applying state law when the same activities are conducted in the state's territorial waters.

Thurmond v. Delta Well Surveyors, supra at 957-58 (Garwood, J., concurring). Despite our reflexive invocation of admiralty jurisdiction to cover contracts involving movable offshore rigs, we have in the OCSLA context recognized that admiralty law is unsuited to dealing with extraction of minerals from the sea bottom. *Laredo,* 754 F.2d 1228 (citing legislative history of OCSLA and *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969)). *See also Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 1428, 84 L.Ed.2d 406 (1985) ("[t]here is nothing inherently maritime about" building and maintaining pipes and platforms on the outer continental shelf).

Second, we could retain our decades-old holding that movable offshore rigs are non-traditional "vessels" in

admiralty, even when moored in place, while attempting to articulate consistent standards for maritime contracts and liabilities. A variation on the second alternative would be to overrule *Thurmond* and *Union Texas* and apply maritime law to all offshore mineral exploration contracts, save those governed by the OCSLA. Whether one of these results, or others we have not yet conceived, should prevail, we leave to the decision of the court *en banc*.

III.

SCHLUMBERGER'S INVITEE STATUS

Avanti contended that at the time Ernest Lewis drowned, Schlumberger may have been an invitee of Pioneer rather than itself on Glendel Rig 18, inasmuch as Schlumberger may have been performing services at Pioneer's request. Although Avanti's theory is intriguing, it was not supported by sufficient evidence to raise an issue for summary judgment purposes. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Avanti purported to substantiate its claim with affidavits from two of its employees. One of them stated that the daily drilling log for the well and Schlumberger's invoice for its logging activities both covered a type of logging activity that Avanti had not specifically requested Schlumberger to perform, and it noted that Avanti was not charged for this service. The second Avanti employee stated that he "had no interest" in certain activity that continued on that platform after Schlumberger removed particular equipment from the hold that was needed for Avanti's contract requirements. Neither employee

attested that Schlumberger actually performed any additional logging that evening.

In response to this evidence, Glendel submitted affidavits from Mesa (formerly Pioneer) and Schlumberger attesting that pioneer did not request Schlumberger to perform any logging services of the type contended by Avanti and that Schlumberger did not do any work on the well other than as requested by Avanti. Avanti's evidence does not squarely contradict these affidavits, hence, no genuine issue of material fact appeared over whether Schlumberger was the invitee of Pioneer at the time of the accident.

For the foregoing reasons, the judgment of the trial court is affirmed.
